IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-255

MICHAEL VINCENT MURPHY III,

Petitioner,

v.

BARBARA BROWNE MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

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October 7, 1974

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia (A. 1a-3a) is reported at 232 Ga. 352, 206 S.E.2d 458 (1974). This opinion reversed an order of the Superior Court of Fulton County, Georgia, dated January 24, 1974, which is unreported (A. 6a-7a), and held the Georgia alimony statutes constitutional. The denial by the Supreme Court of Georgia of petitioner's motion for rehearing (A. 5a) is reported at 232 Ga. 352, 354, 206 S.E.2d 458 (1974).

JURISDICTION

The final judgment sought to be reviewed is the decision of the Georgia Supreme Court rendered on May

21, 1974 (A. 1a-3a), with respect to which a motion for rehearing was denied on June 12, 1974. Petitioner asserts this Court has jurisdiction under 28 U.S.C. §1257(3) to review by writ of certiorari this decision of the Georgia Supreme Court.

QUESTION PRESENTED

Whether the Supreme Court of Georgia in holding the Georgia alimony statutes constitutional against due process and equal protection challenges has decided a substantive federal question previously undetermined by this Court or rendered a decision contrary to applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions relied upon by petitioner are contained in those portions of the Fifth and Fourteenth Amendments to the Constitution of the United States which provide:

> "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."

U.S. CONST. amend. V.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

U.S. CONST. amend. XIV, §2. The specific sections of the Georgia alimony statutes alleged to be unconstitutional by petitioner are Title 30, Sections 201, 202, 203, 204,

206, 209, and 212 of the GA. CODE of 1933 and GA. LAWS, 1967 at 591, all as amended, (GA. CODE ANN. §§30-201, 30-202, 30-203, 30-204, 30-206, 30-209, 30-212 and 30-202.1 respectively) all of which are completely set forth in the Appendix to the Petition at 10a-12a.

STATEMENT

Petitioner and respondent were married September 17, 1969, and separated April 1, 1972. (R. 51, 52). There is one child of said marriage, Alysia Michele Murphy, born October 1, 1970, who is currently 4 years old. (R. 52, 53). Petitioner was graduated from Vanderbilt University and on September 15, 1972, was employed by Shepherd Construction Company at the salary of $195.00 per week as a foreman specifically in charge of safety and traffic control. (R. 50, 51, 54). In addition to the salary derived from his position with Shepherd Construction Company, petitioner receives approximately $400.00 annually in dividends from 130 shares of American Telephone and Telegraph stock, 20 shares of Trust Company of Georgia stock, 75 shares of Rich's, Inc. stock, 75 shares of The Polaroid Corporation stock, 26 shares of Atlantic Steel Company stock, 22 shares of Bibb Manufacturing Company stock, 13 shares of Atlantic Steel Company stock, 10 shares of Georgia Power Company stock and a $4700.00 partnership interest in Metro Atlanta Properties. (R. 164-65). Furthermore, petitioner, on February 5, 1972, became entitled to both principal and income from a trust established by Michael V. Murphy, Sr., valued at $118,108.88 and on September 15, 1972, had a balance of approximately $1400.00 in his checking account. (R. 166, 172). Based on his said financial condition, petitioner has testified that he is in a position not

only to support himself but also his wife and child. (R. 62).

On June 12, 1972, petitioner, through his attorney of record, filed his Complaint for Divorce against respondent in the Superior Court of Fulton County, Georgia, demanding:

> "(a) That plaintiff be granted a total divorce, that is to say a divorce a vinculo matrimonii upon legal principles;"
>
> "(b) That plaintiff be awarded both temporary and permanent custody of said minor child named in the petition;"
>
> "(c) That the said defendant herein be temporarily restrained and enjoined from transferring, selling or conveying the 130 shares of American Telephone and Telegraph stock and the 75 shares of Polaroid stock in any manner whatsoever;"
>
> "(d) That plaintiff be awarded legal title to the said 130 shares of American Telephone and Telegraph stock and the 75 shares of Polaroid stock;"
>
> "(e) That a Rule Nisi issue."

(R. 9, 10). On July 5, 1972, respondent, through her then attorney of record, filed her Answer and Counter-Claim against petitioner alleging, *inter alia:*

> 10.
>
> "The defendant shows that she has been required to obtain the services of an attorney to represent her in this matter and asks that she be awarded attorneys' fees from the plaintiff to assist in the payment of her attorney."
>
> 11.
>
> "The defendant requests that the property of

> the parties be reasonably distributed between the parties and that she receive her portion of property as temporary and permanent alimony. The defendant further requests that the plaintiff be required to keep in full force and effect one or more life insurance polices on the plaintiff's life in the total amount of at least $100,000.00 listing the parties' minor daughter as beneficiary until said child reaches the age of 21 years."

and praying, *inter alia:*

> "(c) That the defendant be awarded temporary and permanent alimony and child support to include an award for attorneys' fees; . . ."

(R. 11, 12). On September 15, 1972, at a hearing in the Superior Court of Fulton County, Georgia, the Court heard testimony on the issues of temporary alimony, temporary custody of the minor child of petitioner and respondent, and whether petitioner and respondent should be restrained and enjoined from selling, transferring and otherwise disposing of certain securities. (R. 48-190). On September 28, 1972, the Superior Court of Fulton County, Georgia, entered its Temporary Order denying respondent temporary alimony, awarding temporary custody of said minor child to Doctor and Mrs. Michael V. Murphy, Jr., the child's paternal grandparents, enjoined respondent from disposing of 130 shares of stock of American Telephone and Telegraph Company and 75 shares of stock of The Polaroid Company, and enjoined petitioner from conveying any stocks and bonds or other assets which he then held, except as may be necessary to meet his basic business and living expenses and legal obligations. (R. 13, 14).

On December 6, 1973, petitioner through his attorney of record, filed his Motion to Dismiss Paragraphs 10 and

11 of appellant's counterclaim and subparagraph (c) of her prayers on the ground that said demands for temporary and permanent alimony and attorneys' fees failed "to state a claim upon which relief properly can be granted for the reason that said demands are based on Sections 30-202, 30-201.1 (Acts 1967, p. 591), 30-203, 30-204, 30-207, 30-209 (Acts 1870, p. 413), and 30-210, 30-213 of the Georgia Code, which statutes provide that alimony and attorneys' fees in alimony and divorce litigation shall be awarded to wives only, which consequently discriminate against husbands as a class of which defendant is a member and which, as applied to respondent, would discriminate against [him] and deny him equal protection of the laws . . . ." (R. 15-18).

On December 26, 1973, respondent filed his amendment to his Motion to Dismiss. (R. 19-22). On December 26, 1973, the Superior Court of Fulton County granted petitioner's Motion to Dismiss. (R. 23-25). On January 4, 1974, respondent filed her Motion for Corrected Order on petitioner's Motion to Dismiss and her Motion for Reconsideration. (R. 27-42). On January 24, 1974, the Superior Court of Fulton County denied respondent's Motion for Reconsideration and on January 25, 1974, entered its Corrected Order, again holding the Georgia alimony statutes as set forth hereinabove unconstitutional. (R. 43-47). Respondent appealed to the Supreme Court of Georgia which on May 21, 1974, reversed the Judgment of the Superior Court and held the Georgia alimony statutes constitutional. (R. 191-96). *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974). On May 31, 1974, petitioner moved for a rehearing before the Supreme Court of Georgia which motion was denied June 12, 1974. (R. 197-203).

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED ON THE GROUNDS THAT PRIOR DECISIONS OF THIS COURT ARE DETERMINATIVE OF THE FEDERAL ISSUES HEREIN AND THE DECISION OF THE GEORGIA SUPREME COURT HOLDING THE GEORGIA ALIMONY STATUTES CONSTITUTIONAL IS IN ACCORD WITH THESE DECISIONS.

Although this Court has not ruled on the merits of the precise federal question decided by the Supreme Court of Georgia, prior decisions of this Court are determinative of the federal issues herein and the decision of the Georgia Supreme Court holding the Georgia alimony statutes constitutional is in accord with these decisions. In fact, on January 12, 1970, this Court denied a Petition for Writ of Certiorari to the Georgia Supreme Court which, if granted, would have raised substantially the identical question which petitioner now seeks to have reviewed. *Bugden v. Bugden,* 225 Ga. 413, 169 S.E.2d 337 (1969), *cert. denied,* 396 U.S. 1005, 90 S. Ct. 558, 24 L. Ed.2d 497 (1970). In *Bugden,* the defendant husband contended "that Sections 1, 2, 3 and 4 of Ga. L. 1005, pp. 630-632; 1964, pp. 713, 714 (Code Ann. §§30-220, 30-221, 30-223) are individually and collectively unconstitutional in violation of the equal protection clauses of the State and Federal Constitutions (Code Ann. §§2-102, 1-815) because they do not allow *a male to file an application for a modification of alimony by which he would receive payment from the female and fails to give him the rights to make the female pay reasonable expenses of litigation where she files for an increase in her perma-*

nent alimony" (original emphasis). *Bugden v. Bugden, supra* at 415. In ruling on this question the Georgia Supreme Court held:

> "It is not a denial of the equal protection clauses of the State and Federal Constitutions to refuse to allow the husband to modify an alimony judgment claiming such right or to deny him attorney fees when the wife files for an increase in permanent alimony. The moral, social, *economic* and physical differences which distinguish the sexes and divide them into natural classes justify differences in the legislative treatment of them." (emphasis added).

Bugden v. Bugden, supra at 416. Although the identical statutes are not challenged in the instant action, respondent submits that the issues presented in *Bugden* are the same as those which petitioner now seeks reviewed.

To escape the impact of *Bugden,* petitioner contends that the rationale of the Georgia Supreme Court in that case, *i.e.* the economic differences which distinguish the sexes, has been categorically and directly repudiated by *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed.2d 225 (1971) and *Frontiero v. Richardson,* 411 U.S. 677, 93 S. Ct. 1764. 36 L. Ed.2d 583 (1973), and the fact that *Reed* and *Frontiero* were decided subsequent to *Bugden* vitiates that decision. As is clear from this Court's opinion in *Kahn v. Shevin,* 414 U.S. 973, 94 S. Ct. 1734, 40 L. Ed.2d 189 (1974), such a contention is patently erroneous.

In *Kahn,* this Court held that statutes which place men and women in different classifications for the purpose of reducing the economic disparities between males and females are constitutional. In making this determination the court stated:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male dominated culture, the job market is inhospitable to the woman seeking any but the lowest paying jobs. There are of course efforts underway to remedy this situation. . . . But firmly entrenched practices are resistant to such pressures, and indeed, data compiled by the Woman's Bureau of the United States Department of Labor shows that in 1972 women working full time had a median income which was only 57.9% of the male median — a figure actually six points lower than had been achieved in 1955. Other data points in the same direction. The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." (footnotes omitted).

Kahn v. Shevin, 94 S. Ct. at 1736-37. Based upon the foregoing findings the Court held:

> "There can be no doubt therefore that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' *Reed v. Reed* 404 U.S. 71, 76, quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415." (footnote omitted).

Kahn v. Shevin, 94 S. Ct. at 1737. Just as importantly, the Court distinguished *Frontiero v. Richardson* as follows:

> "This is not a case like *Frontiero v. Richardson* 411 U.S. 677, where the Government denied its female employees both substantive and procedural benefits granted males *'solely for administrative convenience.'* " (emphasis added)

Kahn v. Shevin, 94 S. Ct. at 1737.

Petitioner also attempts to escape the impact of *Kahn* and contends that this decision was erroneously construed and misapplied by the Georgia Supreme Court. This contention is also clearly erroneous. In *Kahn* the Court goes to considerable effort to recognize the economic inferiority of females to males, and holds that the different treatment of widows (women) and widowers (men) rests upon an attempt to reduce the economic disparity between the sexes. Just as the legislative classification in the Florida statute in *Kahn* has a "fair and substantial relation to the object of [that] legislation" so does the legislative classification in the Georgia alimony statutes. In Georgia, alimony is defined as "an allowance out of the husband's estate, made for the *support* of the wife when living separate from him." (emphasis supplied). Section 30-201 of the GA. CODE of 1933 (A. 10a). That wives as a class upon separation or divorce require financial support which should be furnished by husbands as a class is clear from the following statistical analysis using the data utilized by the Court in *Kahn.* This data, furnished by the Womans Bureau of the United States Department of Labor, reveals that the average annual earnings of males employed full-time year-round was $10,202.00 for calendar year 1972. During the same period, females employed full-time year-round received average annual earnings of $5,903.00. *Kahn v. Shevin,* 94 S. Ct. at 1736, n.5.

Applying the above statistics to a family of three which is being divided by divorce, such as that in the instant action, reveals that prior to the separation of the spouses, such a family in 1972 would have an average annual income of $16,105.00 or an average of $5,368.33 per person. After divorce, without alimony, and with the father receiving custody of the child, the father would receive an average of $10,202.00 annually, to be divided between him and his child, an average of $5,101.00 annually per person, and the ex-wife would receive $5,903.00. However, if the wife receives custody of the child, which is usually the case with young children, without alimony she will receive an average of $5,903.00 annually to be divided between her and the child, or an average of $2,951.50 per person. A similar statistical analysis utilizing the average figures above for a childless couple also illustrates that the wife in that situation is financially deprived as a result of the divorce. Furthermore, it is obvious that the legislative classification made by the Georgia alimony statutes are not made for the purpose of administrative convenience because such statutes require that the court or jury hear both parties (unless either party waives his or her right to such a hearing) and only after hearing both parties and evidence as to *all* circumstances of the parties may the court or jury make an award of alimony. Sections 30-202, 30-203 and 30-209 of the GA. CODE of 1933, as amended. (A. 10a-12a). Therefore, it cannot be said that the classification made by the Georgia alimony statutes is arbitrary or capricious, or that the classification does not reasonably relate to the object of the leigislation.

Based upon the foregoing, respondent submits that the instant matter currently pending before this Court is

essentially identical to *Kahn v. Shevin* and is distinguishable from *Frontiero v. Richardson.* As in *Kahn,* the legislative classification made by the Georgia alimony statutes is based upon the financial and economic differences between men and women as a class, a reasonable classification, and this classification, men — women, reasonably relates to the object of the legislation, *i.e.,* to provide financial support to an economically inferior class. Because an adversary proceeding must precede an award of alimony, the Georgia General Assembly quite clearly had no intention whatsoever of making the classification for the purpose of achieving judicial administrative convenience. Consequently, *Frontiero v. Richardson* is clearly distinguishable from the instant action.

Petitioner also contends that *Kahn* is a tax case, the decision of which was bottomed upon the principal of non infringement of the power of the states to tax. As a casual reading of the final three sentences and a careful analysis of footnote 10 of the majority opinion in *Kahn* will indicate, this contention of petitioner is also erroneous. These sentences clearly state that the Court applied the traditional equal protection requirements to the state statute in question, not notions of non interference with the power of states to tax, and held the challenged statute to be constitutional. That such is clearly the case is even more apparent from footnote 10. In footnote 10, the Court traces the earlier development of equal protection standards to which statutes challenged on equal protection grounds must comply and then discusses the later introduction of these equal protection requisites into the tax field, thus indicating the appropriate application of these equal protection principals in *Kahn.* Therefore, respondent submits that any notions of tax

policy which constitute a portion of the rationale in *Kahn* are secondary to the controlling requisites of equal protection and economic justification.

CONCLUSION

For the foregoing reasons respondent respectfully submits that this petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 1974 three copies of the Brief For Respondent In Opposition were personally delivered at the office of John C. Tyler, counsel for petitioner, 1747 Equitable Building, Atlanta, Georgia, to counsel or a clerk therein.

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